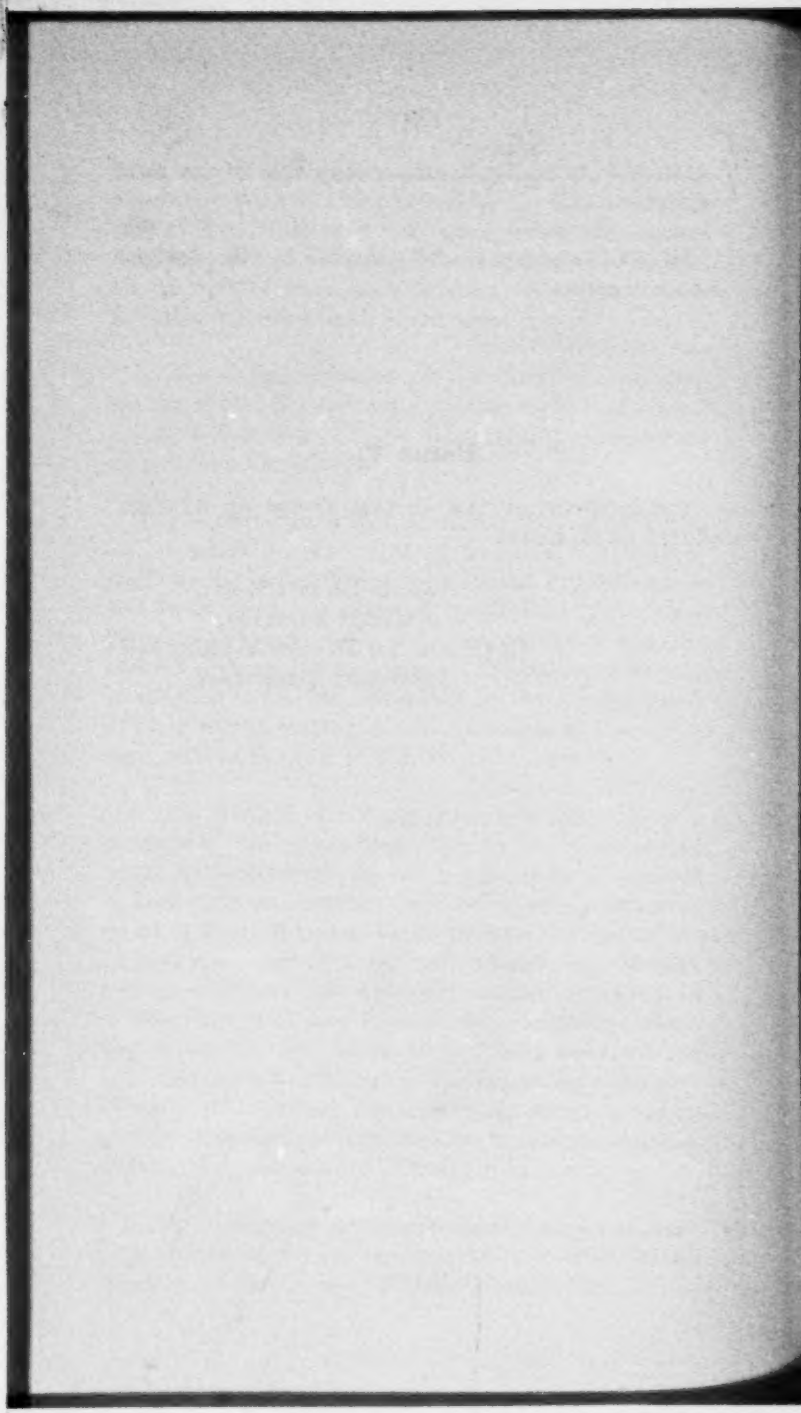

No. 618. 1900. 49
Brf. of Libellant for Respondent
Filed April 30, 1900.

Supreme Court
FILED
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JAMES H. MCKENNEY,
Clerk

Supreme Court of the United States.

WILLIAM L. MOORE, Libellant, AGAINST THE SUN PRINTING AND PUBLISHING ASSOCIATION, Respondent.	618

Brief for Libellant on Motion for Writ of Certiorari.

The libellant sued the respondent in admiralty in the District Court of the United States for the Southern District of New York to recover damages for breach of a charter party made May 14, 1898, whereby the respondent, the owner and publisher of the New York *Sun*, hired the libellant's steam yacht *Kanapaha* for four months from June 1 to October 1, for $10,000, and, among other things, stipulated as follows :

(a) that the hirer " will surrender said yacht with all its gear, furniture and tackle at the expiration of this contract, to the owner, or his agent, at Manning's Basin, foot 26th Street, South Brooklyn, New York, in as good condition as at the start, fair wear and tear

from reasonable and proper use only excepted, and free and clear of any and all indebtedness, liens or charges of any kind or of any description ; "

(b) that " the hirer shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like ; "

(c) that " the hirer during the continuance of this agreement shall at all times and at his own cost and expense keep the said yacht, its hull, machinery, tackle, spars, furniture, gear, boats and the like, in repair ; "

(d). " that for the purpose of this charter the value of the yacht shall be considered and taken at the sum of seventy-five thousand dollars, and the said hirer shall procure security or guaranty to and for the Owner in the sum of seventy-five thousand dollars to secure any and all losses and damages which may occur to said boat or its belongings which may be sustained by the Owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract."

Charter Party, fol. 91.

The agreement of guaranty was executed not by a third person, but by the hirer, and provided :

(a). " that the hirer will well and faithfully perform and fulfil everything in and by the said annexed agreement on his part to be kept and performed ; "

(b). " that we expressly waive and dispense with notice of any demands, suit or action at law against the hirer, and expressly waive any and all notice of nonperformance of the terms of said annexed agreement on the part of the hirer to be kept and performed. The intention of this understanding being to hold us

primarily liable under the terms of the annexed agreement;"

(c). "that our liability hereunto shall in no case exceed the sum of seventy-five thousand dollars."
Guaranty, fol. 98.

Both the charter party and the guaranty were executed by Chester S. Lord, the Managing Editor of the respondent.

At the time the charter was made the yacht was in the possession of the respondent, and was then being used, and thereafter, until she was wrecked, continued to be used in the respondent's business for the purpose of collecting and transmitting news of the Cuban War. She was at all times under the control of a reporter of the *Sun*; her captain and crew were employed, and all her expenses were paid, by the *Sun*.

September 5, 1898, before the expiration of the charter time, the yacht was wrecked on a reef on the north coast of Cuba near the entrance to Nuevitas Harbor. The evidence in the record tends to show that the wreck was attributable to negligence of the master. The libel was amended by charging that the wreck was due to respondent's negligence (fol. 129).

The District Court gave judgment for the libellant for $65,000 and interest, and refused to give the libellant the whole value of the yacht as fixed by the charter party, on the ground that the $10,000 paid him when the charter was made as her hire for four months should be deducted from the $75,000, to which the charterer's liability in respect of breach of covenants in the charter party is expressed in the guaranty to be limited (Decree of District Court, fol. 1430; Opinion of Brown, D. J. fol. 1393).

Both parties appealed to the Circuit Court of Appeals for the Second Circuit, where the judgment was modified by awarding to the libellant the full value of the yacht as fixed in the charter party, without the

deduction made by the District Court, and in other respects was affirmed.

In the Courts below only three questions have been raised by the respondent, apart from certain exceptions to rulings upon matters of evidence taken on the trial, which, in the Circuit Court of Appeals, were not insisted upon, and are obviously of no moment except in so far as they may be involved in the main questions in the case. The respondent's contention was: (1) that respondent is not liable at all under the charter party, because Lord, who executed it, had not authority; (2) that there was no breach of the covenants of the charter party, because the yacht was destroyed by unavoidable accident; and (3) that the measure of damages, being the value of the yacht, was not fixed by the charter party, but ought to have been ascertained by evidence of what the yacht was actually worth at the time and place of her loss.

POINTS.

First. This Court has defined, with sufficient precision to exclude the present application, the nature of the questions upon which it will grant its writ of *certiorari* to review judgments of the Circuit Courts of Appeal otherwise final.

In *American Construction Company vs. Jacksonville Railway* 148 U. S., 372, this Court, speaking of the Act of March 3rd, 1891 (26 Statutes, 826), said: "The act has uniformly been so construed and applied by this Court as to promote its general purpose of lessening the burden of litigation in this court, transferring the appellate jurisdiction in large classes of cases to the Circuit Court of Appeals and making the judgments of that court final, except in extraordinary cases" (p.

382) * * * "In the same spirit the authority conferred on this Court by the very provision on which the petitioners mainly rely, by which it is enacted that 'in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require by *certiorari*, or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court', has been held to be a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision". (pp. 382–3)

In its latest expressions upon this point, the Court has adhered to the rule above laid down and has made it plainer.

In *Forsyth vs. Hammond*, 166 U. S., 506, the Court said: "While this division of appellate power was the means adopted to reduce the accumulation of business in this Court, it was foreseen that injurious results might follow if an absolute finality of determination was given to the Courts of Appeal. Nine separate appellate tribunals might by their differences of opinion, unless held in check by the reviewing power of this Court, create an unfortunate confusion in respect to the rules of Federal decision. As the courts of appeal would often be constituted of two circuit judges and one district judge, a division of opinion between the former might result in a final judgment where the opinions of two judges of equal rank were on each side of the questions involved. Cases of a class in which finality of decision was given to the circuit courts of appeal might involve questions of such public and national importance as to require that a consideration and determination thereof should be made by the supreme tribunal of the nation" (p. 512). * * * "Obviously a power so broad and comprehensive if carelessly exercised might defeat the very thought and

purpose of the act creating the courts of appeal. So exercised it might burden the docket of this court with cases which it was the intent of Congress to terminate in the Courts of Appeal, and which, brought here, would simply prevent that promptness of decision which in all judicial actions is one of the elements of justice..

"So it has been that this Court, while not doubting its power, has been chary of action in respect to *certioraris*. It has said, 'It is evident that it is solely questions of gravity and importance that the Circuit Courts of Appeal should certify to us for instruction; and that it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the court of appeals is made final to be certified, can be properly invoked.'" (citing authorities—pp 513–14). * * * "While this power is co-extensive with all possible necessities and sufficient to secure to this Court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise" (pp. 514, 515).

The principles laid down in the cases above cited were followed by this Court in *Mercantile Trust Company vs Farmers Loan and Trust Company, Trustee*, reported without opinion in 168 U. S. 710. In that case, beside a question of fact, the main question involved was the contention of the Receivers of the St. Louis and San Francisco Railway that the holders of the bonds under a branch line mortgage, upon a proper construction of the lease which bound the branch line to the main system and a general mortgage afterwards made which covered the whole system of

St. Louis and San Francisco Railways, were not entitled to be paid interest on the bonds out of the earnings of the whole system when it appeared that the branch line had not fully earned its operating expenses. The Receivers' contention was overruled by the Circuit Court (71 Fed. R. 601), and by the Circuit Court of Appeals (81 Fed. R. 254), and they were directed to pay the interest on the branch line bonds. Applying the principles of the cases cited above, and considering that the case was of no general or public interest and turned entirely upon the construction of private documents, this Court refused to grant a writ of *certiorari*.

So, the case at bar turns upon the construction of a charter party of a yacht, of no general importance.

Second. The case at bar does not present any question of general importance, nor any conflict in decision between two or more courts of appeal, or between courts of appeal and the courts of a State, nor any matter affecting the interests of the nation in its internal or external relations, nor any other question of public importance.

It involves, in short, nothing but a question of fact and two questions of law.

I. The question of fact is whether the charterer of the *Kanapaha* was the Sun Printing and Publishing Association or Chester S. Lord, its Managing Agent. The District Court held the Association to be the charterer; and the Court of Appeals, without hesitation, adopted the same view.

In this situation of the case, it is settled in this Court that successive and concurrent decisions of two courts in the same case upon a mere question of fact are not to be reversed unless clearly shown to be erroneous. This rule, which is said to be more often

invoked in admiralty cases, is yet equally applicable to appeals in equity.

Towson vs Moore 173 U. S. 17-24

The record contains abundant evidence to justify the conclusion of the courts below. Without attempting to refer to it in detail, or to all the circumstances upon which the conclusion is based, some controlling facts are undisputed.

1. The first charter of the yacht April 1, 1898, was made by Lord, just as the charter in suit was, and under that charter the *Sun* was in possession of the yacht when the charter in suit was made (Charter of April 1, 1898, fol. 83; Test. Anderson, fols. 406-7, 410-412, 416-420; Packard, fol. 948; Peterson, fols. 185-197).

2. The charter money was paid by checks of the *Sun*, the first for $5,000, dated April 2nd, signed W. M. Laffan, Manager, per L. O. Macdaniel (Exhibit 6, fol. 245); and the second, under the charter in suit, for $10,000, dated May 14th signed by Thomas Hitchcock, Secretary, and W. M. Laffan, Manager, (Exhibit 7, fol. 249).

3. The use of the yacht by respondent is admitted in the answer (fols. 63, 70, 113).

4. Payment of the running expenses of the yacht under the charter in suit by the respondent was admitted on the trial (fol. 316). Many details of the payment of expenses of the yacht, crew and reporters by the respondent are exhibited by the record (Test. Anderson, fols. 425-430; Chamberlin, fols. 846-856; Packard, fols. 957-960; Atkinson, fols. 605-624). All these expenses were entered in respondent's books. Among others, the payment of the charter money was entered as follows: "May 17, Charter *Kanapaha* to October 1, $10,000" (fol. 276; Test. Macdaniel, fols. 287, 295, 302-3, 341-356). The *Sun* also provided accommodation for reporters of other papers on board

the yacht, and received payment for the accommodation furnished (Test. Macdaniel, fols. 317–323).

5. The *Sun* insured the yacht for £12,000 by insurance expiring September 2nd. (Test. Macdaniel, fols. 282–293 : Percy Chubb, fols. 926–938 ; Sidney Chubb, fols. 771–790).

6. It was publicly stated in the columns of the *Sun* newspaper that the yacht had been chartered, by such statements as the following : "The *Kanapaha* was chartered by the *Sun* before the outbreak of the war as a despatch boat" (Fols. 382–3).

7. It appears that Mr. Lord also hired other yachts called *Premier* and *Carbonaro*, which were used by the *Sun* during the war (fols. 335, 752–4, 863).

8. Finally, the testimony of Mr. Dana, the president of the Company, and the Chief Editor of the paper, shows conclusively that Lord's authority embraced the power to hire yachts whenever he thought it necessary (Test. Dana, fols. 1222 to 1251).

II. The next question in the case is whether the destruction of the yacht before the expiration of the charter period discharged the covenants in the charter party by which the charterer agreed to keep her in repair, to return her at the end of the charter period, and to be responsible for all loss and damage to her.

The opinion of WALLACE C. J. in the Circuit Court of Appeals discloses the reason why the respondent is not relieved of these covenants by the destruction of the yacht.

Though it be a general rule of bailments that the destruction of the thing bailed, without the fault of the bailee, relieves him of the obligation to restore it at the end of the bailment, whether such obligation be assumed, or be implied by law, it is equally true that he may by his express contract bind himself absolutely to return the thing bailed ; and, if he do so, his contract will be enforced, and the act of God, or unavoidable accident, will not discharge the covenant. Such an

obligation is assumed when the bailee covenants not only to return the thing but also to keep it in repair.

Walton vs Waterhouse, 2 Saund. 420
Bullock vs Dommitt, 6 T. R. 650
Brecknock vs Pritchard, *Ib.* 750
Phillips vs Stevens 16 Mass. 238
McIntosh vs Lown, 49 Barb. 550, 555
Warner vs. Hitchins, 5 Barb. 666
Cook vs. Champlain Transportation Co. 1 Denio 91

The principle is applied to boats no less than to other chattels and to houses.

Ames vs Belden, 17 Barb. 513, 515
Young vs Leary, 135 N. Y. 569, 576–7.

The cases last cited hold that the particular charters there under review did not impose an absolute liability upon the charterers; but they fully recognize the principle.

Such being the effect of covenants to keep in repair and to return the thing bailed, the liability of the charterer in the case at bar is removed from any reasonable doubt by the further stipulation that the charterer will be responsible for all loss and damage to the yacht.

III. The remaining question is the measure of damages. It is not disputed that this is the value of the yacht. The question in controversy is whether her value is fixed in the charter party or not.

The language of the charter would seem to be a sufficient answer to this question. It says: "that for the purpose of this charter the value of the yacht shall be considered and taken at the sum of seventy five thousand dollars" (fol. 94).

If the charter is the respondent's contract, as the courts below have both held it to be, no good reason appears why this stipulation is not as binding as any other.

1. In the courts below it was urged that this stipulation is intended to raise a penalty for nonperformance and is not to be treated as liquidated damages, and, therefore, that the court must find the damages by ascertaining the actual value of the yacht. This contention is unfounded, because the stipulation in question is not an agreement that the charterer will pay either stipulated damages or a penalty upon breach of the charter It merely fixes the value of the vessel.

The distinction between the value of a thing and the damage done to the owner by the destruction of it is perfectly plain, even though the damage be exactly measured by the value.

Van Deusen v Young, 29 N. Y. 9, 36.
Roberts v N. Y. El. R R Co., 128 N. Y. 455.

2. Where parties themselves fix values, as of ships, buildings, cargoes, merchandise or other articles, their agreement is, in the absence of fraud, conclusive upon them, even though the subject of valuation have a market value and though such market value be more or less than the sum agreed upon.

Marine Ins. Co. vs. Hodgson, 6 Cr., 206.
Whitney vs. American Ins. Co., 3 Cow., 210.
P. & S. Steamship Co. vs. Phœnix Ins. Co., 89 N. Y., 559, 564–5.
Hart vs. Pennsylvania R. Co., 112 U. S., 331.
Zimmer vs. N. Y. C. & H. R. R. R. Co., 137 N. Y., 460.
Graves vs. Lake Shore R. R. Co., 137 Mass., 33.
Coupland vs. Housatonic R. R. Co., 61 Conn., 531, 545.

So in cases of insurance it is held that in any action between insurers and insured involving the value of a vessel covered by valued policy and based upon the policy, the agreed valuation is conclusive.

North of England Ins. Assn. vs. Armstrong, L. R., 5 Q. B., 244.

The same principle applies in cases of constructive total loss, where the agreed value, and not the actual value, is the basis of determination.

Irving vs. Manning, 6 C. B. (H. of L.), 391.

And this is true though the ship be shown to have deteriorated greatly when the loss occurred.

Shaw vs. Felton, 2 East, 108.

3. In the present instance the value of the yacht was fixed by stipulation, because it is hardly possible to arrive at it in any other way, for the reason stated by the respondent's master, Captain Atkinson, who said: "A yacht has no commercial value; no market value * * * The value of a yacht is a fancy value * * * A yacht has no value except a fancy valuation". (fols. 582–4.)

IV. In connection with the measure of damages, the question arose upon which the Court of Appeals modified the decree of the District Court. The District Court, holding that the agreed value of the yacht should be taken as the measure of damages, deducted from it the $10,000 charter money paid for the hire of the yacht from May 1st to October 1st. The Court of Appeals held this deduction to be erroneous, and gave judgment for the whole value; and in doing so they were clearly right.

1. The judgment of the District Court was based upon the theory that the liability of the charterer, limited in the agreement of guaranty to $75,000 (fol. 98), is extinguished *pro tanto* by the payment of the stipulated rent. If this were true it would follow that everything done by the charterer, in performance of his engagements, not only to pay rent, but also to pay running expenses, wages, pilotage, tonnage, light house and port dues, and all other dues and charges (fol. 93), would take off so much from the $75,000; and it would result that, if the running expenses of the yacht equalled or exceeded $75,000, the charterer, on the

theory of the District Court, would no longer be answerable for any further running expenses, still less for repairs, and not at all in case of the destruction of the vessel. This theory is unsound, as held by the Court of Appeals, because the object of the parties was to indemnify the owner against damage to or loss of his yacht, and not to provide a fund for supplying news to the readers of the New York *Sun* at the eventual cost of the owner of the yacht in case she should be lost while engaged in that business. The agreement by which the charterer's liablity is limited, while called an agreement of suretyship, is, in truth, in terms of a guaranty.

Hall vs. Farmer, 5 Den. 487
Gallagher vs. Nicholls, 60 N. Y. 438, 444.

No liability accrues to the guarantor until breach of the principal agreement; and the measure of his liability in that case is the damage resulting from the breach. But the District Court held that the amount expended in performing a stipulation of the charter, that is to say, the $10,000 paid for rent, was to be treated as damages for non-payment of rent.

The ruling of the Circuit Court of Appeals was, therefore, right.

V. The respondent's exceptions to rulings on questions of evidence taken during the trial were not pressed in the Circuit Court of Appeals, and, so far as they have any importance, are all involved in the principal questions already alluded to.

Third. The application for writ of *certiorari* should be refused.

GEORGE ZABRISKIE
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